Perwira Habib Bank (M) Bhd v Penerbitan ASA Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-505-1992
KAMALANATHAN RATNAM JC
7 JULY 1997

Civil Procedure *— Pleadings — Denial or traverse, absence of — Allegation of facts — Whether allegation deemed to be admitted — Rule of deemed admissions (implied joinder) — Rules of the High Court 1980 O 18 rr 13 & 14(4)*

Contract *— Guarantee — Consideration — Whether there was no consideration for guarantee because guarantee was signed after agreement to grant facility — Whether consideration was past consideration because monies under temporary overdraft and letter of credit were brought into formalized facility — Whether guarantee void*

Contract *— Construction of terms of contract — Intention of parties — Whether monies outstanding under temporary overdraft became monies outstanding under formalized overdraft facility*

Contract *— Variation — Bank debiting second facility with previous owings — Whether terms of agreement had been varied — Whether defendant discharged from liabilities*

The first defendant opened a current account with the plaintiff and on 5 October 1984 applied for the overdraft facility. The said application was initially refused. However, the plaintiff confirmed that a temporary overdraft facility was granted to the first defendant. Whilst the temporary overdraft facility was in progress, the first defendant appealed to the plaintiff by way of a letter dated 8 January 1985. In the meantime, a letter of credit ('the LC') facility was also granted to the first defendant. By its letter dated 1 March 1985, the plaintiff rejected the appeal dated 8 January 1985. Then by way of a letter of offer dated 26 April 1985, the plaintiff granted overdraft facility to the first defendant for the sum of RM300,000. The first defendant accepted the terms of the letter of offer and the second, third and fourth defendants executed joint and several guarantees as security for the facilities on 7 May 1985. The bank statement then showed that the first defendant started operating the overdraft facility in excess of the limit of RM300,000. The defendant sent various letters to the plaintiff, admitting to the outstanding sum and pleaded for time to settle. Since the first defendant had not complied with the proposal to settle the excess of the overdraft limit, the plaintiff, by way of its notice of demand, demanded from each of the defendants the amount outstanding pursuant to the recalled overdraft facility.

The defendants contended, inter alia, that: (i) the offer was made without any appeal or application but that the plaintiff suddenly decided to make the offer possibly because since the temporary overdraft facility and the LC facility was granted without any terms, conditions and/or securities, the plaintiff, fearful of the fact of not being able to recover this sum, made the offer; and (ii) the allegation

that the overdraft facility was granted without application by the defendants was an allegation of fact. Therefore, an implied joinder would not suffice — it must be specifically denied or specifically not admitted.

The second defendant argued, inter alia, that: (i) the plaintiff, by debiting the second facility with previous owings had varied the terms of the agreement to the detriment of the second defendant and thereby had discharged the second defendant from all liability under the guarantee pursuant to s 86 of the Contracts Act 1950; and (ii) since the agreement to grant the facility was dated 26 April 1985 and the guarantee was dated 7 May 1985, the facility could not have been granted at the request of the guarantor. Therefore there was no consideration to support the guarantee executed by the second defendant and the guarantee was void for lack of consideration pursuant to s 26 of the Contracts Act 1950.

Held, allowing the plaintiff's claim:

(1) The possibility as suggested by the first defendant was a theory unsupported by any credible evidence. Moreover, if the defendants were of the view that the letter of offer was to cover up the absence of any security, then, all the defendants need to have done was to have rejected the letter of offer. Instead, the first defendant accepted the letter of offer and made an unequivocal admission of the sums owing and proposed terms of settlement. It was unconscionable to renege from that admission. The first defendant's application for an overdraft facility made on 5 October 1984 was the very same application that was approved by the plaintiff by way of its letter of offer dated 26 April 1985 (see pp 306I and 308H–I).

(2) The 'deemed admitted' provision in O 18 r 13 of the Rules of the High Court 1980 only applies to a defence to a statement of claim or to a counterclaim. The plaintiff had joined issue on the first defendant's defence in accordance with O 18 r 14(4). In the circumstances, the submission of the first defendant on this issue was as frivolous as it was vexatious (see pp 307I and 308A–B).

(3) There was indeed an appeal by the first defendant after the first rejection. Without an appeal there was no way that the plaintiff would have made the offer. Since the 'theory' of the first defendant for the possible reason for the offer was rejected, it must stand to reason and logic that without an application (or an appeal) no bank will go around disseminating letters of offer on a frolic of their own. Such a suggestion as propounded by the first defendant was tantamount to dredging the depths of despair. There could have been a verbal appeal. It was confirmed that it is a common practice to appeal; otherwise the subsequent approval would not be granted (see p 308D–F).

(4) When the first defendant's application for the overdraft facility was approved on 26 April 1985, the monies outstanding under

A the temporary overdraft became monies outstanding under the formalized overdraft facility. The first defendant was at all material times aware that this was the intention of both the parties. If the first defendant was challenging the legality and the entitlement of the bank to do so, no explanation was given as to why the defendant did not raise any objection to such a blatant irregularity B in the statements, unless of course the said statements mirrored and reflected the true intention of the parties. In the circumstances, the first defendant was estopped from contending that it was not the intention of the parties to have the monies due under the temporary overdraft and the LC brought into the C formalized overdraft facility of RM300,000. Further, s 115 of the Evidence Act 1950 gives statutory backing to the principle of estoppel. The various letters of admission by the first defendant caused the plaintiff to believe that the parties' intention was to bring into the formalized overdraft facility the monies due under the temporary overdraft and the LC (see p 309A–I).

D (5) Section 114(g) of the Evidence Act 1950 was invoked against the first defendant for failing to call its managing director, namely the second defendant, to testify since he was the main participant acting on its behalf. In his absence, the evidence relating to the negotiation must be accepted. The court held that the evidence E which could be and was not produced by the first defendant through its failure to call its managing director to testify on its behalf, would, if produced, be unfavourable to the first defendant (see p 310C–D).

(6) The entries in the current account statements were prima facie F evidence of the indebtedness of the first defendant pursuant to s 3 of the Bankers' Books (Evidence) Act 1949. This evidence had not been rebutted (see p 310F).

(7) The guarantee that was executed by the second defendant was an 'on demand' guarantee. When a guarantee is made payable on demand, the cause of action against the guarantor is founded G on the fact that a demand was made for payment under the guarantee. It was evident that such a demand was made in the present case (see p 312H–I).

(8) The issue of variation had not been pleaded by the second defendant and therefore he ought to be precluded from raising H an issue not raised in his pleadings. Notwithstanding that, even if this issue was considered, there was no variation of the terms of the agreement dated 26 April 1985 between the plaintiff and the first defendant. In the light of the finding that the first defendant at no time was in doubt that the plaintiff was entitled I to bring into the formalized overdraft the amounts due under the temporary overdraft and the LC facilities, this issue is a non-starter (see p 314E–F).

(9) The surrounding circumstances showed that the second defendant was the person behind the running of the first

defendant and that at the time he executed the letter of guarantee he must have been fully aware of the existing indebtedness of the first defendant to the plaintiff. It is incongruous and not in accord with business efficacy for the second defendant to now contend that just because the guarantee was signed after the agreement of 26 April 1985, there was no consideration for the guarantee or that just because the monies under the temporary overdraft and the LC were brought into the formalized facility, the consideration was past (see p 315F–H); *Oriental Bank of Malaya Ltd v N Subramaniam* [1958] MLJ 35, *Yang Chin Lang v Tan Chong & Sons Motor Co Ltd* [1968] 2 MLJ 8 and *Osman bin Abdul Ghani & Ors v United Asian Bank Bhd* [1987] 1 MLJ 27 followed.

(10) The argument that s 92(b) of the Evidence Act 1950 enabled the second defendant to contradict and vary the statement in the agreement by way of an oral agreement was a non-starter because by electing to submit no case to answer and thereby not calling any witnesses the second defendant had not led any evidence as to the existence of any oral agreement that could be used to vary the agreement and thereby invoking s 92(b) of the Evidence Act 1950 (see p 316B–C).

[Bahasa Malaysia summary

Defendan pertama telah membuka akaun semasa dengan plaintif dan pada 5 Oktober 1984 telah memohon untuk kemudahan overdraf. Permohonan tersebut pada mulanya ditolak. Walau bagaimanapun, plaintif mengesahkan bahawa kemudahan overdraf sementara telah diberikan kepada defendan pertama. Semasa kemudahan overdraf sementara berkuatkuasa, defendan pertama merayu kepada plaintif menerusi sepucuk surat bertarikh 8 Januari 1985. Sementara itu, kemudahan surat kredit ('SK') juga telah diberikan kepada defendan pertama. Menerusi surat bertarikh 1 Mac 1985, plaintif menolak rayuan bertarikh 8 Januari 1985. Kemudian melalui surat tawaran bertarikh 26 April 1985, plaintif memberikan kemudahan overdraf kepada defendan pertama untuk jumlah RM300,000. Defendan pertama menerima terma surat tawaran dan defendan-defendan kedua, ketiga dan keempat melaksanakan gerenti bersesama dan berasingan sebagai cagaran untuk kemudahan-kemudahan pada 7 Mei 1985. Kenyataan bank kemudiannya menunjukkan bahawa defendan pertama telah mula menggunakan kemudahan overdraf melampaui had sebanyak RM300,000. Defendan menghantar pelbagai surat kepada plaintif, dengan mengakui jumlah yang terhutang dan meminta masa untuk menjelas bayaran. Oleh kerana defendan pertama tidak mematuhi cadangan untuk menjelaskan jumlah yang melebihi had overdraf, melalui notis tuntutan, plaintif menuntut amaun yang terhutang daripada setiap defendan berikutan daripada overdraf yang ditarik balik.

Defendan-defendan berhujah, antara lain, bahawa: (i) tawaran dibuat tanpa sebarang rayuan atau permohonan tetapi bahawa plaintif

A tiba-tiba memutus untuk membuat tawaran mungkin kerana memandangkan kemudahan overdraf sementara dan SK ditawarkan tanpa sebarang terma, syarat dan/atau cagaran, plaintif, yang khuatir tidak dapat mendapat kembali jumlah ini, membuat tawaran itu; dan (ii) pengataan bahawa kemudahan overdraf diberikan tanpa permohonan oleh defendan-defendan merupakan satu pengataan B fakta. Dengan itu, suatu percantuman tersirat tidak akan memadai — ia mestilah disangkal secara spesifik atau tidak diakui secara spesifik.

Defendan kedua berhujah, antara lain, bahawa: (i) plaintif dengan mendebitkan kemudahan kedua dengan jumlah terhutang yang lepas telah mengubahsuai terma perjanjian hinggakan menjejaskan defendan C kedua dan dengan itu telah melepaskan defendan kedua daripada semua liabiliti di bawah gerenti menurut s 86 Akta Kontrak 1950; dan (ii) oleh kerana perjanjian untuk memberikan kemudahan bertarikh 26 April 1985 dan gerenti bertarikh 7 Mei 1985, kemudahan itu tidak mungkin diberikan atas permintaan penggerenti. Maka D tiada balasan untuk menyokong gerenti yang dilaksanakan oleh defendan kedua dan gerenti itu adalah tak sah atas kekurangan balasan menurut s 26 Akta Kontrak 1950.

Diputuskan, membenarkan tuntutan plaintif:

E (1) Kemungkinan seperti yang dicadangkan oleh defendan pertama adalah satu teori yang tidak disokong oleh apa-apa keterangan yang boleh dipercayai. Tambahan pula, sekiranya defendan-defendan berpandangan bahawa surat tawaran adalah untuk menyembunyi ketiadaan cagaran, maka apa yang perlu dilakukan oleh defendan-defendan adalah untuk menolak surat F tawaran. Sebaliknya, defendan pertama menerima surat tawaran dan membuat satu pengakuan jelas atas jumlah yang terhutang dan mencadangkan terma penyelesaian. Adalah tidak saksama untuk memungkiri pengakuan itu. Permohonan defendan pertama untuk overdraf yang dibuat pada 5 Oktober 1984 adalah permohonan yang sama yang diluluskan oleh plaintif G melalui surat tawarannya bertarikh 26 April 1985 (lihat ms 306I dan 308H–I).

(2) Peruntukan 'disifatkan sebagai diakui' dalam A 18 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 hanya terpakai dalam pembelaan kepada pernyataan tuntutan atau kepada suatu H tuntutan balas. Plaintif telah mencantumkan isu atas pembelaan defendan pertama menurut A 18 k 14(4). Dalam keadaan-keadaan itu, hujah defendan pertama atas isu ini adalah remeh dan menyusahkan (lihat ms 307I dan 308A–B).

(3) Memang terdapat satu rayuan oleh defendan pertama selepas I penolakan pertama. Tanpa satu rayuan tidak kemungkinan plaintif akan membuat tawaran itu. Oleh kerana 'teori' defendan pertama untuk sebab yang mungkin atas tawaran itu ditolak, ia mestilah dapat diterima akal dan logik bahawa tanpa permohonan (atau suatu rayuan) tiada bank akan menyebarkan surat tawaran secara suka-suka dengan sewenang-wenangnya.

Cadangan sedemikian seperti yang dikemukakan oleh defendan pertama sama seperti membangkitkan sesuatu yang sia-sia. Rayuan secara lisan mungkin telah dibuat. Ia disahkan bahawa ia merupakan suatu amalan umum untuk merayu; jika tidak kelulusan yang berikut tidak akan diberikan (lihat ms 308D–F). A

(4) Apabila permohonan defendan pertama untuk kemudahan overdraf diluluskan pada 26 April 1985, wang yang terhutang di bawah overdraf sementara menjadi wang yang terhutang di bawah kemudahan overdraf yang dirasmikan. Pada semua masa material defendan pertama sedar bahawa ini adalah hasrat kedua-dua pihak. Sekiranya defendan pertama mencabar kesahan dan hak bank untuk berbuat demikian, tiada penjelasan diberikan tentang mengapa defendan tidak menimbulkan sebarang bantahan kepada luar aturan yang menonjol dalam penyata, melainkan penyata tersebut membayangkan dan memantulkan hasrat sebenar pihak-pihak. Dalam keadaan-keadaan itu, defendan pertama diestop daripada menghujahkan bahawa ia bukanlah hasrat pihak-pihak untuk membawa wang yang harus dibayar di bawah overdraf sementara dan SK ke dalam rangkuman kemudahan overdraf yang dirasmikan sebanyak RM300,000. Selanjutnya, s 115 Akta Keterangan 1950 memberikan sokongan statutori kepada prinsip estopel. Pelbagai surat pengakuan oleh defendan pertama menyebabkan plaintif mempercayai bahawa hasrat pihak-pihak adalah untuk membawa wang yang terhutang di bawah overdraf sementara dan SK ke dalam rangkuman kemudahan overdraf yang dirasmikan (lihat ms 309A–I). B C D E

(5) Seksyen 114(g) Akta Keterangan 1950 digunakan terhadap defendan pertama kerana gagal memanggil pengarah urusannya, iaitu defendan kedua, untuk memberi keterangan oleh kerana dia adalah peserta utama yang bertindak bagi pihaknya. Dalam ketidakhadirannya, keterangan berhubung dengan perundingan mestilah diterima. Mahkamah memutuskan bahawa keterangan yang boleh dan tidak dikemukakan oleh defendan pertama menerusi kegagalan untuk memanggil pengarah urusannya untuk memberi keterangan bagi pihaknya tidak akan memihak kepada defendan pertama andainya dikemukakan (lihat ms 310C–D). F G

(6) Catatan-catatan dalam penyata akaun semasa adalah keterangan prima facie tentang hutang defendan pertama menurut s 3 Akta Buku Banker (Keterangan) 1949. Keterangan ini tidak dipatahkan (lihat ms 310F). H

(7) Gerenti yang dilaksanakan oleh defendan kedua adalah gerenti 'atas tuntutan'. Apabila sesuatu gerenti dijadikan harus dibayar atas tuntutan, kausa tindakan terhadap penggerenti adalah berasaskan hakikat bahawa tuntutan dibuat untuk bayaran di bawah gerenti. Adalah nyata bahawa tuntutan demikian telah dibuat dalam kes ini (lihat ms 312H–I). I

(8) Isu variasi tidak diplidkan oleh defendan kedua dan dengan itu dia sepatutnya dikecualikan daripada membangkitkan suatu isu yang tidak dibangkitkan dalam plidingnya. Namun begitu, sekalipun isu ini dipertimbangkan, tiada variasi atas terma perjanjian bertarikh 26 April 1985 di antara plaintif dan defendan pertama. Memandangkan keputusan bahawa defendan pertama tidak ragu-ragu pada bila-bila masa bahawa plaintif adalah berhak membawa amaun yang terhutang di bawah kemudahan overdraf sementara dan SK ke dalam overdraf yang dirasmikan, isu ini adalah suatu yang langsung tidak boleh digunakan (lihat ms 314E–F).

(9) Keadaan-keadaan sekeliling menunjukkan bahawa defendan kedua adalah orang di sebalik pengendalian defendan pertama dan bahawa pada masa dia melaksanakan surat gerenti dia sedar akan hutang defendan pertama kepada plaintif. Adalah tidak wajar dan tidak menurut amalan perniagaan bagi defendan kedua untuk kini menghujah bahawa oleh kerana gerenti ditandatangani selepas perjanjian pada 26 April 1985, tiada balasan untuk gerenti atau bahawa oleh kerana wang di bawah overdraf sementara dan SK dibawa ke dalam kemudahan yang dirasmikan, balasannya telah lepas (lihat ms 315F–H); *Oriental Bank of Malaya Ltd v N Subramaniam* [1958] MLJ 35, *Yang Chin Lang v Tan Chong & Sons Motor Co Ltd* [1968] 2 MLJ 8 dan *Osman bin Abdul Ghani & Ors v United Asian Bank Bhd* [1987] 1 MLJ 27 diikut.

(10) Hujah bahawa s 92(b) Akta Keterangan 1950 membolehkan defendan kedua menyangkal dan mengubah kenyataan dalam perjanjian melalui perjanjian lisan adalah suatu yang langsung tidak boleh digunakan kerana dengan memilih untuk menghujahkan tiada kes untuk dijawab dan tidak memanggil mana-mana saksi defendan kedua tidak mengemukakan sebarang keterangan mengenai kewujudan apa-apa perjanjian lisan yang boleh digunakan bagi mengubah perjanjian tersebut dan dengan itu menimbulkan s 92(b) Akta Keterangan 1950 (lihat ms 316B–C).]

Notes

For a case on absence of denial or traverse, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2571.

For cases on consideration for guarantee, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1640–1645.

For cases on intention of parties, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1405–1406.

For cases on variation, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2293–2294.

Cases referred to

Bank Bumiputra (M) Bhd v Aris bin Massod & Ors (Kuala Lumpur High Court Civil Suit No D3–22–1779–89, unreported) (refd)

Bank Bumiputra (M) Bhd v Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Bradford Old Bank v Sutcliffe [1918] 2 KB 833 (refd)
Harris v Gamble [1878] 7 Ch D 877 (refd)
Oriental Bank of Malaya Ltd v N Subramaniam [1958] MLJ 35 (folld)
Osman bin Abdul Ghani & Ors v United Asian Bank Bhd [1987] 1 MLJ 27 (folld)
Perwira Habib Bank Bhd v Lim Hong Tatt [1989] 1 MLJ 263 (refd)
Rutter v Tregent [1879] 12 Ch D 758 (refd)
Wee Kee Puan v Overseas-Chinese Banking Corp Ltd [1982] 1 MLJ 64 (refd)
Yang Chin Lang v Tan Chong & Sons Motor Co Ltd [1968] 2 MLJ 8 (folld)
Yourell & Anor v Hibernian Bank Ltd [1918] AC 372 (refd)

Legislation referred to

Bankers' Books (Evidence) Act 1949 s 3
Contracts Act 1950 ss 26, 82, 86
Evidence Act 1950 ss 92(b), 114(g), 115
Rules of the High Court 1980 O 18 rr 13, 14(4), 8(1)(b), (c)

Paul Kwong (*Azman Davidson & Co*) for the plaintiff.
James Selva (*CS Murti* with him) (*Ong Kok Bin & Co*) for the first and second defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

On 17 September 1984, the first defendant opened a current account with the plaintiff and on 5 October 1984 applied for the overdraft facility. The said application was initially refused. However, Koh Teck Lee (PW1), the bank officer of the plaintiff, confirmed that a temporary overdraft facility for RM150,000 was granted to the first defendant and that it commenced on 19 December 1984. Whilst the said temporary overdraft facility was in progress, the first defendant appealed to the plaintiff by way of a letter dated 8 January 1985. In the meantime, a letter of credit ('the LC') facility for RM90,000 was also granted to the first defendant which was to become due on 15 May 1985.

By its letter dated 1 March 1985, the plaintiff rejected the appeal dated 8 January 1985 and requested settlement of the outstanding balance of RM142,567.39 as at 1 March 1985 in the current account with accrued interest therein with a further request that the LC be settled on the due date.

Then by way of a letter of offer dated 26 April 1985, the plaintiff granted overdraft facility to the first defendant for the sum of RM300,000

with an interest rate at 3% above the base lending rate (BLR) which at that time was 12% pa. The security for the facilities was to be two-fold:

(i) Registered first fixed charge for RM300,000 to be created by the second defendant over a single storey semi-detached house held under Title No CT 13890 Lot No 70, Sec 86A, Town and District of Kuala Lumpur.

(ii) Original continuing unconditional joint and several personal guarantee for RM300,000 to be executed by the second, third and fourth defendants.

The first defendant accepted the terms of the letter of offer by its acknowledgement letter dated 29 April 1985. The second, third and fourth defendants also executed the joint and several guarantees on 7 May 1985. Subsequently on 22 May 1985 the plaintiff debited into the first defendant's account the LC facility of RM90,276.16. However, by 30 April 1986 the bank statement at p 71 of the agreed bundle of documents (ABD 71) showed that the first defendant started operating the overdraft facility in excess of the limit of RM300,000. The plaintiff then wrote to the first defendant on 3 December 1986 (ABD 30) that there has been an excess of RM20,306.25 as at 2 December 1986 and requested the first defendant to regularize the account. By way of a reply dated 9 December 1986 (ABD 31), the first defendant admitted not having conducted the overdraft facility satisfactorily and appealed for time 'to settle the liability in full' and confirming that settling the overdraft was its main intention.

Although ABD 30 indicated that if the excess was not settled in seven days the plaintiff would recall the facility, the plaintiff did not do so. Tan Kwe Hee (PW2), the deputy manager, credit control and monitoring, testified that the bank did not recall the facility because of ABD 31 and also because the second defendant as the managing director of the first defendant met with PW2 to propose a settlement of the excess of the overdraft limit. The proposed settlement and the meeting was referred to in the plaintiff's letter dated 9 February 1987 (ABD 32) to the first defendant with a reminder that since the first defendant had not complied with the proposal, the plaintiff was recalling the facility with immediate effect and that the first defendant was to settle the outstanding overdraft account plus whatever interest was to be charged within seven days, failing which legal proceedings would be instituted. Whilst not referring to the letter dated 9 February 1987, the first defendant referred to ABD 30 again pleading for time and this time enclosing a post-dated cheque for RM10,000 with an assurance of full settlement. The plaintiff responded by rejecting the proposed settlement of the first defendant and making a counter-proposal with a fair warning that if there was a failure on the part of the first defendant to comply, legal proceedings would be instituted. The first defendant's response was to send a further cheque for RM5,000. By its letter dated 4 April 1987 the plaintiff, whilst crediting the RM5,000, demanded the balance of the excess and the instalment payment offered based on the plaintiff's earlier proposal and again threatening legal action for non-compliance. The first defendant then by its open letter dated 17 April 1987, whilst admitting to the outstanding sum by agreeing to

settle the same, requested information on the rate of interest that it was being charged. The plaintiff informed the first defendant that the rate of interest was 16% pa on the entire balance outstanding from the day the overdraft facility was recalled. Ignoring all subsequent letters of the plaintiff, the first defendant, by way of its letter dated 22 June 1987, referred to the plaintiff's letter dated 4 April 1987 and pleaded for time to settle. In fact, the said letter quite categorically stated that 'owing to the current recession' the first defendant's collection had been very poor in the past months and that was why its account with the plaintiff had been 'inoperative'. By way of its notice of demand dated 21 November 1991, the plaintiff demanded through its solicitors, from each of the defendants, the amount of RM675,641.07 together with interest at 16% pa on monthly rests from 1 October 1991 to date of realization being the amount outstanding, pursuant to the recalled overdraft facility.

What is overdraft?

In simple terms, it means money lent whereby a bank, because of an arrangement between itself and a customer, allows the customer to over-draw on an account. In other words, the over-drawing is a lending by the bank to the customer of the money at a rate of interest to be fixed by the bank. This lending and borrowing becomes a contract which can be express or implied. Usually the customer operates a current account with the bank and then is allowed to operate the overdraft facility to the amount approved by the bank, through the said current account.

Was there an appeal by the first defendant?

The defendants deny that between the date of rejection of the application for the overdraft facility and the letter of offer of the facility the first defendant made an appeal. It is the defendants' contention that the offer was made without any appeal or application but that the plaintiff suddenly decided to make the offer. The first defendant submitted that a possible explanation for this sudden change of heart by the plaintiff was because since the temporary overdraft facility, which the first defendant referred to as the first facility, was granted without any terms, conditions and/or securities and that the amount outstanding under this facility on 1 March 1985, that is the date the first defendant's application was rejected was RM142,567.39 and also since a further facility for the sum of RM90,000 by way of an LC was also opened on behalf of the first defendant and since these two sums would amount to RM232,567.39 by 15 May 1985, the first defendant submitted, that the plaintiff, fearful of the fact of not being able to recover this sum, made the offer. This proposition was put to PW1 who denied it.

This possibility as suggested by the first defendant is a theory unsupported by any credible evidence. The basis for this possibility is the averment in the amended defence and counterclaim wherein the first defendant avers that the plaintiff by its letter dated 1 March 1985 (ABD 18) rejected the first defendant's application and then later suddenly offered

the first defendant the facility. It is my finding that the averments in the defence and counterclaim allegedly supporting the theory propounded by the first defendant remain as bare allegations. This is not a trial on pleadings per se.

The rule of deemed admissions (implied joinder)

It was the first defendant's submission that the allegation by the plaintiff that the overdraft facility was granted without application by the defendants, is an allegation of fact. Therefore, an implied joinder would not suffice. Such an allegation of fact, it was argued, must be specifically denied or specifically not admitted. Referring to *Harris v Gamble* [1878] 7 Ch D 877 and *Rutter v Tregent* [1879] 12 Ch D 758, the first defendant submitted that where there is no specific denial which does not answer the fact in substance, then it is treated as an admission. In the circumstances, the first defendant reasoned that the plaintiff had thereby admitted that the offer of the facility for RM300,000 was made by the plaintiff without application by the first defendant. Referring to O 18 r 8(1)(b) and (c) of the Rules of the High Court 1980 ('the RHC'), the first defendant pointed out that in any pleading subsequent to a statement of claim, a party must plead any fact which if not specifically pleaded might take the opposite party by surprise or which raises issues of fact not arising out of the preceding pleading. In the instant case, despite the plaintiff filing a reply to the defence and defence to counterclaim, the plaintiff had not taken issue on the first defendant's averments that the facility was granted without application of the first defendant. I was urged to hold that the plaintiff ought not to give evidence of matters not contained in the statement of claim or in the other part of the pleadings.

The relevant rule relating to admissions and denials in respect of pleadings is O 18 r 13 of the RHC which reads:

> 13 Admissions and denials (O 18 r 13)
> (1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.
> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
> (3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.
> (4) Any allegation that a party has suffered damage and any allegation as to the amount of damages is deemed to be traversed unless specifically admitted.

It is my judgment that the 'deemed admitted' provision in O 18 r 13 of the RHC only applies to a defence to a statement of claim or to a counterclaim. The plaintiff has joined issue on the first defendant's defence. Order 18 r 14(4) states:

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is an implied or express joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

In the circumstances, the submission of the first defendant on this issue is as frivolous as it is vexatious.

In *Harris*'s case, a defendant by his defence simply put the plaintiffs to proof of the several allegations in their statement of claim. He did not appear at the trial, but service of a notice of trial upon him was proved. The court held that the defendant had admitted the facts alleged in the statement of claim and that the plaintiffs were entitled to judgment without adducing any evidence in support of their case. In *Rutter*'s case, the court held that unless the allegations in a statement of claim are specifically denied, the plaintiff is entitled to move for judgment as upon an admission of fact in the pleadings.

Coming back to the question as to whether there were indeed an appeal by the first defendant after the first rejection, I find as a fact that there was indeed such an appeal. Surely without an appeal there is no way that the plaintiff would have made the offer. Since I had rejected the 'theory' of the first defendant for the possible reason for the offer, it must stand to reason and logic that without an application (or an appeal) no bank will go around disseminating letters of offer on a frolic of their own. Such a suggestion as propounded by the first defendant is tantamount to dredging the depths of despair. I accept PW1's explanation that there could have been a verbal appeal. Even PW2 confirmed that it is a common practice to appeal; otherwise the subsequent approval would not be granted.

The suggestion that the letter of approval was granted because the plaintiff feared that it could not recover the sum of RM142,567.39 is an unkind suggestion. Indeed without any security the bank had granted a temporary overdraft facility. No one can fathom the way the bank works. At times it acts as the benevolent benefactor rushing to succour those in distress. At other times it resembles a draconian system devoid of sympathy and pragmatism.

Obviously the bank did grant a temporary overdraft facility for RM150,000. If the defendants were of the view that the letter of offer was to cover up the absence of any security, then, all the defendants need to have done was to have rejected the letter of offer. If they were devoid of funds, the plaintiff would have been hard put to recover the sum. Instead, the first defendant accepted the letter of offer; in addition thereto, the first defendant made an unequivocal admission of the sums owing and proposed terms of settlement through the second defendant. Surely, it is unconscionable to renege from that admission. I have no hesitation in holding that the first defendant's application for an overdraft facility made on 5 October 1984 is the very same application that was approved by the plaintiff by way of its letter of offer dated 26 April 1985, after the first defendant's verbal appeal.

Operations of the principle of estoppel

It is my judgment that when the first defendant's application for the overdraft facility was approved on 26 April 1985, the monies outstanding under the temporary overdraft became monies outstanding under the formalized overdraft facility. The first defendant was also granted an LC facility which was due on 15 May 1985. When the LC became due, the sum of RM90,276.16 was debited into the first defendant's current account under the formalized overdraft facility. The defendant does not dispute the fact that the monies outstanding under the temporary overdraft and the LC were appropriated into the formalized overdraft facility of RM300,000. What is disputed is the plaintiff's entitlement to do so.

It is my finding that the first defendant was at all material times aware that this was the intention of both the parties. DW1 admitted under cross-examination to receiving all the current account statements. If the first defendant was challenging the legality and the entitlement of the bank to do so, no explanation was given as to why the defendant did not raise any objection to such a blatant irregularity in the statements, unless of course the said statements mirrored and reflected the true intention of the parties. That is why the defendants kept quiet. Further the bank statements (see ABD 67 to 127) contain the following endorsement:

> The figures and balances shown above will be considered correct unless the bank is notified of any discrepancy within fourteen days.

In the circumstances, I hold that the first defendant is now estopped from contending that it was not the intention of the parties to have the monies due under the temporary overdraft and the LC brought into the formalized overdraft facility of RM300,000. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, Gopal Sri Ram JCA said at p 344:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

Section 115 of the Evidence Act 1950 reads as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

The section gives statutory backing to the principle of estoppel, yet further strangulating the first defendant's case. The various letters of admission by the first defendant, earlier referred to, caused the plaintiff to believe that the parties' intention was to bring into the formalized overdraft facility the monies due under the temporary overdraft and the LC. No doubt, that in reliance thereof, the plaintiff had not taken steps to call in those monies

due under the temporary overdraft and the LC which the plaintiff would have done had the first defendant stated otherwise in their correspondence. In fact the plaintiff bank had altered its position to its detriment in relying on the first defendant's correspondence as any claims for the recovery of those monies under the temporary overdraft and the LC is now time-barred as more than six years have elapsed since the amounts became due.

Application of s 114(g) of the Evidence Act 1950

I have no hesitation in invoking s 114(g) of the Evidence Act 1950 against the first defendant for failing to call its managing director, namely the second defendant, to testify since he was the main participant acting on its behalf. In his absence, the evidence of PW2 relating to the negotiation he had with the managing director, must be accepted. He dealt with the plaintiff and must be presumed to have full knowledge of the facts. His reticence to testify on his own behalf whereby he elected to submit no case to answer, ought not to have prevented the first defendant from issuing a *subpoena duces tecum* to compel his attendance. I therefore hold that the evidence which could be and was not produced by the first defendant through its failure to call its managing director to testify on its behalf, would, if produced, be unfavourable to the first defendant.

Section 3 of the Bankers' Books (Evidence) Act 1949

There is no dispute over the demand. In fact, the plaintiff has even annexed the AR cards addressed to the defendants together with a copy of the said notice. I also invoke s 3 of the Bankers' Books (Evidence) Act 1949 to hold that the entries in the current account statements are prima facie evidence of the indebtedness of the first defendant. In fact, the bank statements are found in pp 40 to 127 of ABD which contains by consent the agreed bundle of documents. Consequently, the overdrawn balance of RM675,641.07 as at 30 September 1991 shown in p 127 of ABD is prima facie evidence of what is due from the first defendant to the plaintiff. This evidence has not been rebutted.

Interest

I find that the plaintiff is entitled to levy interest at the rate of 16% pa (at monthly rests) on the amount due from the first defendant until full payment pursuant to the letter of offer dated 26 April 1985. Clause 6(1) of the said letter of offer states that:

> Interest on the overdraft is to be calculated on the daily outstanding amount and is payable monthly.

The said letter further states:

> We, however, reserve our right to cancel this sanction or to call back our money *or to raise rate of interest at our discretion.* (Emphasis added.)

The plaintiff had in fact as early as on 31 July 1986 informed the first defendant that an interest rate of 16% pa would be charged on amount in

excess of the approved drawing limit effective 1 August 1986. When the overdraft facility was recalled by letter dated 9 February 1987, all the balance due was deemed as the amount in excess and chargeable with the rate of interest of 16% pa at monthly rests.

Was the sum of RM300,000 advanced by the plaintiff

The first defendant submitted that the plaintiff had not advanced the sum of RM300,000 as agreed. I have no hesitation in making a finding, from the statements of the first defendant's current account and the acknowledgement by the first defendant's letter, that the amount was utilized by the first defendant. The first defendant relied on *Perwira Habib Bank Bhd v Lim Hong Tatt* [1989] 1 MLJ 263. In that case, the plaintiff granted to the defendant an overdraft facility to a limit of RM750,000 with interest thereon at 14.5% pa, such interest to be calculated on the daily amount outstanding and payable monthly. The defendant, inter alia, raised the following issues:

(i) whether the limit of RM750,000 included interest; if interest is included then the plaintiff cannot claim more than RM750,000;

(ii) whether the plaintiff can charge compound interest; and

(iii) whether the plaintiff had power to increase the rate of interest after the facility was terminated.

Judgment was given for the plaintiff and on appeal by the defendant to the judge in chambers, Siti Norma Yaakob J (as she then was) held that the limit of the facility could only mean the maximum principal sum sanctioned by the overdraft on which interest at the rate agreed should be levied.

It is my judgment that in *Perwira Habib Bank Bhd*, the defendant contended that his indebtedness was only up to the limit of RM750,000. Her Ladyship's cryptic response was that the bank is not expected to grant an interest-free loan. However, her Ladyship did not decide upon the question as to how unpaid interest, when due, is to be treated at the end of a period when interest is to be paid by the borrower. In the instant case, interest was to be calculated on the daily balance and payable monthly pursuant to cl 6(1) of the agreement dated 26 April 1985. It is my judgment that if such monthly interest is not paid on an overdraft at the end of the month, then the unpaid interest is added onto the overdraft limit granted. In other words, the unpaid interest is capitalized. I find support for this in the decision of Lord Atkinson in *Yourell & Anor v Hibernian Bank Ltd* [1918] AC 372 at pp 384–385, wherein his Lordship said:

> ... Whenever on balancing the mortgagor's current account with the bank a debit balance was found against him, that balance, by force of the covenant, became part of the principal moneys secured by the mortgage, subject, however, to the above-mentioned limit. Whatever increased that balance increased the amount of these moneys; whatever diminished it diminished their amount. If sums paid into the bank were, with the consent of the mortgagor, credited to him by the bank in this current account as against that balance, it necessarily followed that they were, by the implied agreement

> of the parties, appropriated pro tanto to the payment of what had become the principal money then due under the deed. The course of dealing actually followed by the parties, from the date of the mortgage down to the bringing of the action, was this: Interest was calculated from day to day on the mortgagor's overdraft on his current account. On the balancing of this account each half-year the amount of this interest was entered on the debit side of the account, a balance was then struck, and interest was charged during the next half-year upon that balance. The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is a usual and perfectly legitimate mode of dealing between banker and customer.

In the instant case, the agreement of 26 April 1985 has specifically provided that compound interest is payable, that is, that interest was calculated on the daily balance and payable monthly. I therefore allowed the plaintiff's claim against the first defendant for RM675,641.07 with interest from 30 September 1991 at 16% pa at monthly rests from 1 October 1991 to date of payment and costs.

Counterclaim

I have found that the plaintiff did not breach the agreement of 26 April 1985. In any event, it is plain as pikestaff that the first defendant had not received any specific orders for the books based on which the first defendant had calculated the alleged loss of profit. In fact under cross-examination, DW1, the administrative officer of the first defendant, admitted that the first defendant had received no fixed orders nor deposit for books from the government or from any other party. There is therefore no basis for their counterclaim and I accordingly dismissed the same with costs.

Case against the second defendant

At the close of the case for the plaintiff, the second defendant elected to submit no case to answer.

It is the second defendant's case that he executed the letter of guarantee dated 7 May 1985 on the terms as contained in the agreement dated 26 April 1985.

Whether the plaintiff has a cause of action against the second defendant

I find that the guarantee that was executed by the second defendant together with two others is an 'on demand' guarantee. The relevant term of the guarantee which suggests so is found in the first paragraph of the said guarantee beginning with the words 'In consideration ...'. When a guarantee is made payable on demand, the cause of action against the guarantor is founded on the fact that a demand was made for payment under the guarantee. In *Bank Bumiputra (M) Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 Zakaria Yatim J (as he then was) said at p 204:

> It is clear from the terms of the letter of guarantee quoted above that the plaintiff is only entitled to claim up to $1,600,000 together with interest if

A a demand is made to the second defendant for the payment of such sum with interest. A letter of demand dated 29 July 1987 was sent by the plaintiff through their solicitors to the second defendant by AR Registered Post. It is not in dispute that the letter was duly received by the second defendant. The said letter is reproduced below:

B After reproducing the said letter of demand, his Lordship went on to say:

> In my opinion, when the above demand was made to the second defendant a cause of action arose against him. Therefore time started to run from the date of the letter of demand for the purpose of the Limitation Act 1953. Since the present suit was filed on 16 September 1987, the plaintiff's claim against the second defendant is not time-barred.
>
> C Where there is a covenant or promise to pay a collateral sum on demand, such as a covenant by a surety for the principal debtor, a request must be made before an action is brought or before the money can be considered as owing by the collateral debtor.

In *Wee Kee Puan v Overseas-Chinese Banking Corp Ltd* [1982] 1 MLJ 64 D (FC), the then Federal Court cited with approval the decision of the English Court of Appeal in *Bradford Old Bank v Sutcliffe* [1918] 2 KB 833 that the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety. It is evident that such a demand was made in the case before me. It is my judgment that raising this issue at this point in time is an after E thought on the part of the second defendant.

What has to be borne in mind is that the second defendant was the managing director of the first defendant and that according to the evidence of PW1, it was the second defendant who was running the business of the first defendant. The letters from the first defendant earlier referred to were F all signed by the second defendant. Further, the second defendant met with PW2 to discuss settlement. Yet the second defendant elected to submit no case to answer. That of course is his privilege; but in the light of the above-referred unchallenged evidence before the court, surely it was incumbent upon the second defendant to explain or deny the evidence led G by the plaintiff.

In any case, notwithstanding the above, the plaintiff's claim against the second defendant is based on the guarantee that he executed which provides that he is to pay the plaintiff on demand. All that the second defendant is relying on is an allegation that the statements were unreliable because the wrong code was entered in the current account statement. H The statement of account at ABD 54 shows the sum of RM90,276.16 under Code 7 which is service charges. I find that this error was sufficiently explained by PW1 in his testimony. PW1 averred in an affidavit in support of the O 14 application that this entry under Code 7 was made in error since the usual service charge at that time was only RM10, and that it I could never ever have been RM90,276.16. PW1 confirmed this under cross-examination. I accept PW1's explanation and since this is the crux of the second defendant's submission, the argument must therefore crumble. Other than this challenge, the second defendant had not adduced any evidence to show that the amount owing was wrong. In fact, it is not

inappropriate for this court to make a finding that the second defendant does not dispute the amount but that he disputes the right of the plaintiff to bring into the formalized overdraft of RM300,000 the amounts due under the temporary overdraft and the LC facilities. This belief of the second defendant is ill-founded because neither the agreement dated 26 April 1985 between the plaintiff and the first defendant nor the guarantee executed by the second defendant determines how the overdraft of RM300,000 was to be made use of. In any event, I find that the first defendant at no time was in doubt that the plaintiff was entitled to bring into the formalized overdraft the amounts due under the temporary overdraft and the LC facilities.

Is there a discharge of the second defendant due to variation by the plaintiff?

The second defendant argued that the plaintiff, by debiting the second facility with previous owings had varied the terms of the agreement to the detriment of the second defendant and thereby had discharged the second defendant from all liability under the guarantee. Relying on s 86 of the Contracts Act 1950, the second defendant submitted that predisbursements of the guaranteed amount would discharge the guarantor of his liability.

I find that this issue has not been pleaded by the second defendant and therefore he ought to be precluded from raising an issue not raised in his pleadings. Notwithstanding that, even if I were to consider this issue, it is my finding that there is no variation of the terms of the agreement dated 26 April 1985 between the plaintiff and the first defendant. In the light of my earlier finding that the first defendant at no time was in doubt that the plaintiff was entitled to bring into the formalized overdraft the amounts due under the temporary overdraft and the LC facilities, this issue is a non-starter.

Past consideration

It was submitted that since the agreement to grant the facility was dated 26 April 1985 and that it was granted upon the application of the first defendant, and since the guarantee was dated 7 May 1985, therefore the facility could not have been granted at the request of the guarantor. In the circumstances, I was urged to hold that there was therefore no consideration to support the guarantee executed by the second defendant. Relying on s 26 of the Contracts Act 1950, the second defendant submitted that the guarantee was void for lack of consideration and relied on an unreported decision of VC George J (as he then was) in *Bank Bumiputra (M) Bhd v Aris bin Massod & Ors* Kuala Lumpur High Court Civil Suit No D3–22–1779–89. In that case, the facts disclosed that at the request of a company, the plaintiff granted overdraft facilities to the said company by way of letters of offer dated 30 May 1981 and 12 April 1982 and duly accepted by the company, for overdraft facilities of RM175,000 and RM800,000 respectively. In consideration of the plaintiff having agreed to advance credit facilities to the said company, the first, second, third and fourth defendants executed a letter of guarantee to the plaintiff dated 30 October 1984 whereby they jointly and severally agreed to pay on demand to the

plaintiff up to the sum of RM1,500,000 for principal only and interest and costs which shall then or shall at any time be owing or remain due and unpaid to the plaintiff from the said company. His Lordship said:

> It is to be noted that it was at the request of SSM Sdn Bhd that the overdraft facilities were granted to it and that this was done on 30 May 1981 and 12 April 1982. It has also to be noted that the letter of guarantee was executed on 30 October 1984 and the consideration is stated to be 'the plaintiff having agreed to advance credit facilities' which in the context had reference to the said facilities granted in 1981 and 1982.
>
> Clearly the consideration for the defendants executing the guarantee as set out in the statement of claim was past consideration and as such is bad consideration.
>
> The appeal had to be and was allowed with costs. The statement of claim as against the second defendant was struck off with costs.

In *Oriental Bank of Malaya Ltd v N Subramaniam* [1958] MLJ 35 where the facts were almost similar to the present case, the defendant argued that he had only guaranteed the debt of the principal in respect of overdrafts made to him by the bank after the date of the execution of the letter of guarantee. The then Court of Appeal held that a guarantee, like every other contract, must be construed reasonably. It must be construed not only by the words used but also with regard to the surrounding circumstances. The court held that the overdraft mentioned in the letter of guarantee was the overdraft which was in existence when it was executed and therefore the respondent was liable to pay the full sum, being the total of the debit balance of the principal.

In the case before me, the surrounding circumstances show that the second defendant was the person behind the running of the first defendant and that at the time he executed the letter of guarantee he must have been fully aware of the existing indebtedness of the first defendant to the plaintiff. The second defendant was the person who negotiated with the plaintiff for time to settle the first defendant's debt. It is incongruous and not in accord with business efficacy for the second defendant to now contend that just because the guarantee was signed after the agreement of 26 April 1985, there is no consideration for the guarantee or that just because the monies under the temporary overdraft and the LC were brought into the formalized facility, the consideration is past. The principle laid down in *Oriental Bank*'s case was approved and followed by the then Federal Court in *Yang Chin Lang v Tan Chong & Sons Motor Co Ltd* [1968] 2 MLJ 8. It was the view of the court that it ought to consider the circumstances of the whole case in interpreting the intention of the parties. Borrowing a phrase from s 82 of the Contracts Act 1950, the Federal Court held it to be a 'continuing guarantee'. Both *Oriental Bank*'s case and *Tan Chong*'s case were referred to and adopted by the (then) Supreme Court in *Osman bin Abdul Ghani & Ors v United Asian Bank Bhd* [1987] 1 MLJ 27.

I am bound to accept the decision of the then Federal and Supreme Court not only on the principle of stare decisis but also on the basis that their Lordships had expounded the law correctly and succinctly. Although

a draft order of the Federal Court dismissing the appeal against the decision of VC George J was produced, I will follow the decision in the *Oriental Bank*, *Tan Chong* and *Osman bin Abdul Ghani* since all these three cases were never referred to before VC George J.

The second defendant also submitted that s 92(b) of the Evidence Act 1950 enabled him to contradict and vary the statement in the agreement by way of an oral agreement. This argument is a non-starter because by electing to submit no case to answer and thereby not calling any witnesses the second defendant has not led any evidence as to the existence of any oral agreement that could be used to vary the agreement and thereby invoking s 92(b) of the Evidence Act 1950.

Having considered the submissions of the parties and all the authorities cited, I allowed the plaintiff's claim against the second defendant on the same terms as I awarded against the first defendant. Judgment had already long ago been obtained against the third and fourth defendants.

Order accordingly.

Reported by Jafisah Jaafar